

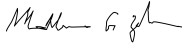


## Finance Policy Memorandum No. FM21-13

**Area:** All USADF Agency Organizational Units

**Date:** September 21, 2021

**Target:** All Staff

**From:** Mathui Zahui, Director of Financial Management/CFO   
Finance and Administration Department

**Subject:** Lapse in Appropriations

### 1. AUTHORITY

- (a) Anti-Deficiency Act (31 U.S.C. §§ 1341-1342, §§ 1511-1519)
- (b) Opinions of the Attorney General (43 Op. Att'y Gen. 224, April 25, 1980; Op. Att'y Gen., 293, January 16, 1981)
- (c) Office of Management and Budget Bulletin No. 80-14
- (d) Office of Management and Budget Bulletin No. 80-14, Supplement 1
- (e) Office of Management and Budget, Circular No. A-11
- (f) Memorandum, *Agency Operations in the Absence of Appropriations*, November 17, 1981
- (g) Article 1, section 9, clause 7 of the United States Constitution
- (h) Chapters 13 and 15, Title 31, United States Code

### 2. PURPOSE

This policy memorandum (PM) sets forth the United States African Development Foundation's (USADF) procedures for closing the agency in the event there is a lapse in USADF's appropriations. This PM responds to the Office of Management and Budget's (OMB) Circular No. A-11 requirement that Federal agencies develop procedures to ensure an orderly shutdown in the event of a funding gap.

### 3. SCOPE

This PM applies to all of the Agency's organizational units.

#### 4. BACKGROUND

A “lapse in appropriations” or “funding gap” refers to the period of time between the expiration of an appropriation and the enactment of a new one. Also, a funding gap may occur any time a continuing resolution (CR) expires and a new CR (or regular appropriation bill) is not enacted immediately thereafter. A CR continues funding for projects or activities for which appropriated funds were available during the prior fiscal year; during a CR prior year funds may be used to enter into new contracts.

In the event of a funding gap, agencies are prohibited by law from incurring any obligation that cannot be funded from prior year money, unless the obligation is required to protect life or property. (Failure to comply with this prohibition may result in criminal sanctions, fines, and removal of officers). The exceptions to the prohibition are described below.

- (a) *Multi-year appropriations and indefinite appropriations*: since these are not annual appropriations, they are available for obligation. USADF generally receives two-year appropriations. Any available prior year funds may be obligated during a lapse, if the use of current year funds is not required to affect the obligation.
- (b) *Express authorizations for contracting authority and borrowing authority*: this refers to specific authority from Congress to contract or borrow without an appropriation. The Attorney General has determined that a simple authorization or direction to perform a certain action in an enabling statute, such as entering into contracts, is insufficient to support a finding of express authorization or necessary implication. USADF does not have this authority.
- (c) *Necessary implications*: this exception refers to functions that must continue even during a lapse in appropriation because the lawful continuation of other activities necessarily implies that these functions will continue as well. An often cited example is the writing and distributing of checks to pay social security benefits that operate under indefinite appropriations. The Attorney General has also determined that “agencies are by necessary implication authorized ‘to incur those minimal obligations necessary to closing [the] agency’ to provide for the orderly termination of functions that may not continue during a period of lapsed appropriations.” The Attorney General’s determination allows USADF to obligate funds necessary to carry out shutdown activities.
- (d) *Obligations necessary to the discharge of the President’s constitutional duties and powers*: the restrictions on obligations are not intended to critically impair the exercise of constitutional functions assigned to the executive. This exception has no implications for USADF.
- (a) *Personal or voluntary services “for emergencies involving the safety of human life or the protection of property”*: this exception applies only if the following conditions are met--
  - (i) there is some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property; and
  - (ii) there is some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in performance of the function.Emergency does not include ongoing, regular functions, the suspension of which would not immediately threaten the safety of human life or the protection of property. This

exception applies to USADF only if a true emergency that threatens human life or property arises.

## **5. AUTHORIZED PURPOSES**

During a period where there is funding gap, the Foundation will restrict obligations from current year funds to those obligations needed to ensure the safety of human life or protect property. The only exceptions are obligations necessary to carry out an orderly shutdown or respond to an emergency that creates a clear and imminent threat to the safety of human life or property. Generally, new obligations during a lapse will have the following purposes:

- (a) protection of human life and property, including voluntary services in an emergency situation;
- (b) processing of necessary personnel actions, i.e., preparation of furlough notices;
- (c) processing of payroll for the periods prior to the interruption of funding; and
- (d) provision for orderly transfer of custody of records to the General Services Administration (GSA) and the Office of Personnel Management (OPM) for disposition if the lapse exceeds 30 days.

## **6. PROHIBITED PURPOSES**

Any obligation from current year funds with a purpose other than protection of human life or property, ensuring an orderly shutdown, or responding to an emergency that threatens human life or property is prohibited. Examples of prohibited purposes include the following:

- (a) award of grants, cooperative agreement, or the signing of memoranda of understanding, implementation letters and other agreements. Personnel involved in the shutdown will continue to monitor the execution of grants and cooperative agreements already funded pending decisions on the disposition of these agreements;
- (b) award of contracts and new procurements, except those necessary to carry out authorized activities. Existing service contracts will be suspended, except for those essential to carrying out the authorized purposes or those that are funded with prior appropriations and do not require the obligation of funds, such as USADF staff salaries, to continue;
- (c) training activities;
- (d) use of government equipment, utilities or other property for purposes not related to the authorized activities;
- (e) any personnel action other than that required to furlough employees and provide salary for the period immediately preceding the funding gap;
- (f) travel of persons and transportation of goods, unless the travel is for an authorized purpose as described above or does not incur a new obligation after the lapse in funding. Persons in travel status on the date funding lapses must return to their duty station by the earliest means possible consistent with an orderly shutdown;
- (g) expenditure of any kind for a purpose not required to carry out an authorized activity;

- (h) acceptance of voluntary services to carry out authorized activities if there is an expectation that those providing the services will be compensated after the Foundation receives an appropriation. Only those voluntary services required in an emergency to protect human life or property will be accepted.

## **7.0 PROCESS**

The shutdown process takes place in two phases. The first is the preparation phase and the second is the shutdown phase.

### **7.1 Preparation Phase**

During the period immediately before a possible lapse in funding, the USADF President initiates a planning process aimed at facilitating an orderly and timely shutdown of operations. The objective is to take actions, as appropriate, to ensure that actual shutdown activities can be completed in half a day.

Each organizational unit or office: (a) identifies activities in its area that must be carried out in order to comply with shutdown requirements and those that should continue during the shutdown; (b) outlines necessary actions to shut down or continue activities; (c) identifies who should take the actions; (e) estimates the time required to complete the actions; and (f) lists those actions that can be taken prior to the actual lapse in appropriations. Based on this information, the President, in consultation with the General Counsel (GC) and other staff as appropriate, determines which activities should be carried out immediately before and during the shutdown and which employees are needed to carry out the shutdown and which employees may be needed intermittently once the shutdown has occurred (referred to as excepted staff).

Attached as Appendix A is a sample shutdown preparation schedule.

### **7.2 Shutdown Phase**

#### **7.2.1 Agency Activities**

The Table below identifies activities that will take place during a shutdown. To the maximum extent practical and consistent with shutdown guidance, all Agency functions that require use of current funds will be suspended.

USADF's principal function is the award of grants and cooperative agreements to African entities for projects and programs they undertake. The grants and cooperative agreements are fully obligated when the awards are made. Thus, the recipients of the awards will continue to operate during the shutdown.

USADF has 15 field offices in Africa, all of which are staffed by locally hired personal services contractors (PSC) who oversee the grants and cooperative agreements. In order to avoid a disruption in the flow of grant and cooperative activities, USADF will not suspend the fully funded

personal services contracts for field staff during a funding lapse; however, the PSCs will be restricted to working on those tasks required to maintain on-going grant and cooperative agreement activities. No new PSC obligations will be made, unless using the carry forward funds. USADF will use prior year funds to cover the salaries of a limited number of full-time employees in Washington to carry out the following: (a) supervise and support the locally hired PSCs and deal with any emergencies that threaten human life or property in Africa; and (b) process grant disbursements to grant and cooperative agreement recipients from prior year funds.

In addition to awarding grants and cooperative agreements, USADF enters into contracts with businesses, vendors, and individuals for personal services. All contracts will be suspended during the shutdown, except those for services needed to ensure the environmental safety of the Agency's information technology systems.

#### 7.2.2 Personnel

On the first day of the lapse in funding (or, if appropriate, by close of business on the day funding expires and there is no new appropriation or CR), all staff, except those funded from prior year funds and those determined to be initially needed to conduct the shutdown, will be instructed to clear their desks, return any files and leave work. The staff listed in the Table below have been identified to carry out the initial shutdown activities. Once the initial shutdown activities are completed, within the first half-day, these personnel will leave the office.

Certain of the staff identified below may also be needed on an intermittent basis, once the initial shutdown activities are completed, to carry out the critical tasks identified below that are not prohibited and are necessary to protect human life or property, respond to emergencies that threaten human life or property, and ensure that an orderly shutdown is maintained. To the extent these personnel are needed intermittently during the shutdown, after the initial shutdown has occurred, they are deemed "excepted" personnel (*i.e.*, excepted from furlough). USADF monitors the percentage of USADF employees identified as excepted in accordance with the guidelines in OMB Circular No. A-11 and provides any necessary legal justifications to OMB.

USADF's staff consists of 28 Federal employees, nine institutional contractors, and three personal services contractors in Washington and 16 locally hired personal services contractors in Africa. Five Federal employees are the minimum required (on an intermittent basis) to ensure the protection of life and property as substantiated in the Table below. The relatively high percentage of excepted employees to total Federal employees is a consequence of the Agency's small staff size. USADF staff not designated as excepted ("non-excepted" staff), including all personal services contractors working for USADF in Washington, D.C., will not report to work during the furlough.

<b>Position</b>	<b>Critical Task</b>	<b>Justification</b>	<b>When</b>
President and CEO	Notify USADF Board, key Congressional committees, OMB, OPM, Treasury, and GSA that the shutdown has begun and should be completed in half a day	Necessary to effect orderly shutdown	First half-day
	Ensure that any non-essential travel scheduled to take place during the lapse is cancelled	Necessary to effect orderly shutdown	First half-day
	Provide executive guidance during shutdown process	Necessary to protect human life and property	Intermittently
General Counsel	Provide legal guidance on allowable and unallowable activities during the lapse in funding	Necessary to effect orderly shutdown and protect human life and property	First half-day and intermittently
	Represent Agency in any legal action involving threat to government property or human life	Necessary to protect human life and property	Intermittently
Director of Financial Management/CFO	Ensure that the payroll is processed	Necessary to effect orderly shutdown	First half-day
	Notify institutional contractors of suspension in disbursements, since staff is not available to manage and coordinate contracts	Necessary to effect orderly shutdown	First half-day
	Coordinate budgetary and financial impacts of shutdown, deal with vendors and landlord as necessary, and provide liaison with other government agencies	Necessary to protect government property	Intermittently

Chief Program Officer	Coordinate field operations, including ensuring furlough notices and instructions are sent to field staff	Necessary to effect orderly shutdown	First half-day
	Ensure that all non-essential program activities, such as training and conferences, are cancelled and vendors are notified	Necessary to effect orderly shutdown	First half-day
	Manage and coordinate overseas program activities funded with prior appropriations	Necessary to protect human life and property	Intermittently
Information Technology Specialist	Provide for shutdown of non-excepted staff members' access to the IT system, if requested by Senior Management	Necessary to effect orderly shutdown	First half-day
	Ensure Federal employees and PSC staff in Washington receive furlough notices	Necessary to effect orderly shutdown	First half-day
	Deactivate Datawatch cards for non-excepted staff, if requested by Senior Management	Necessary to effect orderly shutdown	First half-day
	Ensure the computer server is maintained	Necessary to protect government property	Intermittently

If there is no new appropriation within one week, the President in consultation with the General Counsel will determine if there is a need for any of the personnel listed above to return to the office. In the event the lapse in appropriations lasts 30 days, the President and other excepted personnel will return to the USADF offices to arrange for final disposition or protection of agency properties and records.

During the furlough, all employees will be instructed to monitor the media and the OPM website closely for information on the status of appropriations. In addition, the USADF President or her designee(s) will notify staff when funds are available to resume operations and the date and time employees are expected to return to work.